Tan Seok Leng (as the administratrix of the estate of Tan Kim Cheng, the deceased) v Magasu Sundram a/l T Magasu & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-1192–12 OF 2012
YEOH WEE SIAM J
18 JANUARY 2013

Contract — Option to purchase — Sale and purchase of property — First defendant granted deceased first option to purchase land — No sale and purchase agreement executed between deceased and first defendant — Claim by administratrix of estate of deceased that first defendant had prevented deceased from exercising option — Whether first defendant breached agreement by entering into sale and purchase agreement ('SPA') with second defendant — Whether there was conspiracy between first and second defendants regarding SPA in order to deprive deceased from exercising option — Whether SPA null and void — Limitation — Whether plaintiff's action time-barred — Undue delay — Whether there was undue delay by deceased or plaintiff in filing this action — Whether second defendant bona fide purchaser of land — Counterclaim — Whether defendants entitled to aggravated damages

The first defendant was the owner of a piece of land situated in Kuala Lumpur ('the land'). The first defendant and the deceased had entered into many agreements for the sale of the land to the latter. Under the first agreement dated 27 June 1990 the first defendant had given the deceased the first option of being the developer for the construction works on the land. The deceased had exercised that option by building 25 temporary buildings on the land. On 7 January 1992, the first defendant and deceased had entered into a second agreement. The second agreement provided, inter alia, that the first defendant would give the deceased the first option to purchase the land at the prevailing market price, which was to be determined by a licensed valuer jointly agreed to by the parties. On 30 September 2002, the first defendant gave the deceased notice to exercise this option to purchase the land subject to various terms and conditions. Despite various correspondences between the parties, there was no sale and purchase agreement drafted or executed between the two parties. On 10 January 2003, the first defendant entered into an agreement for the sale of the land to the second defendant ('the SPA'). The deceased died on 13 July 2011. The plaintiff, who is the administratrix of the estate of the deceased, claimed that the SPA was null and void. She thus commenced the present suit against the defendants. The plaintiff's action was based on the deceased's right of first option to purchase the land as provided under the terms of the second agreement. The plaintiff submitted that the deceased could not exercise the option to purchase the land when the first defendant executed the SPA to sell

the land to the second defendant. By way of this action the plaintiff sought, inter alia, a declaration that the first defendant had breached the agreements he had entered into with the deceased, a declaration that the second defendant had not acquired any interest in the land, a declaration that the plaintiff and the plaintiff's tenants were entitled to possession of the buildings built by the deceased on the land for so long as they paid the ground rents; specific performance of the agreement granting the deceased the right to exercise the option to purchase the land; damages for breach of the agreements in lieu of or in addition to specific performance. The first defendant submitted that any contracts or agreements signed between the deceased and the first defendant had lapsed and were no longer valid. Hence the defendants counterclaimed and prayed for vacant possession of the land occupied by the plaintiff and/or the plaintiff's tenants, damages and compensation.

Held, dismissing the plaintiff's claim and allowing the defendants' counterclaim in part with costs of RM20,000:

(1) In the present case, there was no sale and purchase agreement executed between the deceased and the first defendant due to the failure of the deceased to exercise his option to purchase the land. As such, the plaintiff was relying on the second agreement as the basis of her claim. Thus the plaintiff's action was founded on contract, which was limited by the limitation period of six years under s 6(1)(a) of the Limitation Act 1953. Since the plaintiff's action was not filed within six years from 10 January 2003, when the first defendant executed the SPA with the second defendant, it was time-barred. Even if the limitation period applicable to this action was not six years, based on contract, but 12 years for recovery of land there was also undue delay by the deceased or the plaintiff in filing this action (see paras 47–48).

(2) Based on the evidence adduced it was clear that the first defendant had given the deceased the first option to purchase the land. However, since the deceased had not agreed to the terms and conditions and time frame set by the first defendant that option had lapsed and the first defendant was at liberty to sell the land to the second defendant. Accordingly the plaintiff was not entitled to exercise the option to purchase the land at the value as on 30 September 2002, ie the date when the first defendant gave the deceased notice to exercise the option to purchase the land (see paras 32–33).

(3) There was no evidence adduced by the plaintiff of any conspiracy between the first and second defendants regarding the SPA in order to deprive the deceased or his estate from exercising the deceased's option to purchase the land. As such, the SPA between the first and second defendants was valid in law and the second defendant was a bona fide purchaser. The evidence had shown that the full purchase price had been

paid by the second defendant and that the original title had been forwarded to the second defendant (see paras 42–33).

(4) The evidence showed that the deceased had done nothing during his lifetime to file an action for specific performance for the second agreement regarding the right of first option to purchase the land other than entering eight caveats on the land to protect his interest in the land. It was only after the plaintiff was granted letters of administration to the estate of the deceased that she filed this action on 8 December 2011. This meant that for nine years, ie from the date of the SPA on 10 January 2003 to 8 December 2011, the deceased and in turn the plaintiff sat on their rights. There was no satisfactory explanation provided by the plaintiff as to why the deceased had not instituted any action against the first defendant during his lifetime. In the present case there was undue delay due to the deceased's inaction or acquiescence. It was implicit that should the deceased fail to exercise the option to purchase the land then the first defendant had the right to sell the land to the second defendant. Upon the sale of the land to the second defendant, the agreements signed between the first defendant and the deceased would lapse automatically (see paras 45, 47 & 51).

(5) Further as the second defendant had become the sole beneficiary of the land and the first defendant was holding the land as a mere trustee pending registration of the transfer of the land to the second defendant, the first defendant could no longer accept the ground rental from the deceased and the plaintiff after 5 April 2005 (see para 51).

(6) Although the defendants had claimed aggravated or exemplary damages in their counterclaim, in the exercise of the court's discretion and going by the circumstances of the case and considering that the plaintiff and the estate of the deceased had a lot to lose should the plaintiff fail in this action, the defendants were not entitled to such damages (see para 55).

[Bahasa Malaysia summary

Defendan pertama adalah pemilik sebidang tanah yang terletak di Kuala Lumpur ('tanah tersebut'). Defendan pertama dan si mati telah memasuki banyak perjanjian untuk jualan tanah tersebut kepada si mati. Di bawah perjanjian pertama bertarikh 27 Jun 1990 defendan pertama telah memberikan pilihan pertama kepada si mati sebagai pemaju untuk kerja pembinaan atas tanah tersebut. Si mati telah menggunakan pilihan tersebut dengan membina 25 bangunan sementara atas tanah tersebut. Pada 7 Januari 1992, defendan pertama dan si mati telah memasuki perjanjian kedua. Perjanjian kedua memperuntukkan, antara lain, bahawa defendan pertama akan memberikan si mati pilihan pertama untuk membeli tanah tersebut pada harga pasaran semasa, yang perlu ditentukan oleh penilai berlesen yang telah dipersetujui bersama oleh pihak-pihak. Pada 30 September 2002, defendan

pertama telah memberikan si mati notis untuk menggunakan pilihan ini untuk membeli tanah tersebut tertakluk kepada pelbagai terma dan syarat. Walaupun terdapat pelbagai surat-menyurat antara pihak-pihak, tiada perjanjian jualan dan belian yang telah didrafkan atau dimasuki antara kedua-dua pihak. Pada 10 Januari 2003, defendan pertama telah memasuki perjanjian untuk jualan tanah tersebut kepada defendan kedua ('PJB tersebut'). Si mati telah meninggal dunia pada 13 Julai 2011. Plaintif, yang merupakan pentadbir harta pusaka si mati, mendakwa bahawa PJB tersebut adalah terbatal dan tidak sah. Dia dengan itu telah memulakan guaman ini terhadap defendan-defendan. Tindakan plaintif adalah berdasarkan hak si mati untuk pilihan pertama membeli tanah tersebut sebagaimana diperuntukkan di bawah terma-terma perjanjian kedua. Plaintif berhujah bahawa si mati tidak menggunakan pilihan tersebut untuk membeli tanah tersebut apabila defendan pertama menyempurnakan PJB tersebut untuk menjual tanah tersebut kepada defendan kedua. Melalui tindakan ini plaintif memohon, antara lain, deklarasi bahawa defendan pertama telah melanggar perjanjian-perjanjian yang dimasukinya dengan si mati, deklarasi bahawa defendan kedua tidak memperoleh apa-apa kepentingan atas tanah tersebut, deklarasi bahawa penyewa-penyewa plaintif berhak terhadap milikan bangunan-bangunan yang dibina oleh si mati atas tanah tersebut selagi mereka membayar sewa tanah; pelaksanaan spesifik perjanjian yang memberikan si mati hak untuk menggunakan pilihan untuk membeli tanah tersebut; ganti rugi kerana pelanggaran perjanjian-perjanjian menggantikan atau tambahan kepada pelaksanaan spesifik. Defendan pertama berhujah bahawa apa-apa kontrak atau perjanjian yang ditandatangani antara si mati dan defendan pertama telah luput dan tidak lagi sah. Justeru defendan-defendan menuntut balas dan memohon untuk milikan kosong tanah tersebut yang didiami plaintif dan/atau penyewa-penyewa plaintif, ganti rugi dan pampasan.

Diputuskan, menolak tuntutan plaintif dan membenarkan sebahagian daripada tuntutan balas defendan-defendan dengan kos RM20,000:

(1) Dalam kes ini, tiada perjanjian jual beli yang dimasuki antara si mati dan defendan pertama akibat kegagalan si mati menggunakan pilihannya untuk membeli tanah tersebut. Oleh itu, plaintif bergantung kepada perjanjian kedua sebagai asas tuntutannya. Oleh itu tindakan plaintif adalah berasaskan kontrak, yang terbatas oleh tempoh had masa enam tahun di bawah s 6(1)(a) Akta Had Masa 1953. Oleh kerana tindakan plaintif tidak difailkan dalam tempoh enam tahun dari 10 Januari 2003, apabila defendan pertama menyempurnakan PJB tersebut dengan defendan kedua, ia telah luput masa. Walaupun tempoh had masa itu terpakai kepada tindakan ini bukan enam tahun, berdasarkan kontrak, tetapi 12 tahun untuk mendapat semula tanah tersebut terdapat juga kelewatan yang tidak wajar oleh si mati atau plaintif dalam memfailkan tindakan ini (lihat perenggan 47–48).

(2) Berdasarkan keterangan yang dikemukakan adalah jelas bahawa defendan pertama telah memberikan si mati pilihan pertama untuk membeli tanah tersebut. Walau bagaimanapun, oleh kerana si mati tidak bersetuju dengan terma dan syarat dan jangka masa yang ditetapkan oleh defendan pertama maka pilihan itu telah luput dan defendan pertama bebas untuk menjual tanah tersebut kepada defendan kedua. Sewajarnya plaintif tidak berhak untuk menggunakan pilihan untuk membeli tanah tersebut untuk nilai sehingga 30 September 2002, iaitu tarikh bila defendan pertama memberikan si mati notis untuk menggunakan pilihan untuk membeli tanah tersebut (lihat perenggan 32–33).

(3) Tiada keterangan yang dikemukakan oleh plaintif terdapat konspirasi antara defendan-defendan pertama dan kedua berhubung PJB bagi tujuan menafikan si mati atau harta pusakanya daripada menggunakan pilihan si mati untuk membeli tanah tersebut. Oleh itu, PJB antara defendan-defendan pertama dan kedua adalah sah di sisi undang-undang dan defendan kedua adalah pembeli bona fide. Keterangan menunjukkan bahawa harga penuh belian telahpun dibayar oleh defendan kedua dan bahawa hak milik asal telahpun diserahkan kepada defendan kedua (lihat perenggan 42 & 33).

(4) Keterangan menunjukkan bahawa si mati tidak berbuat apa-apa semasa hayatnya untuk memfailkan satu tindakan bagi pelaksanaan spesifik untuk perjanjian kedua berhubung hak pilihan pertama untuk membeli tanah tersebut selain daripada memasukkan lapan kaveat ke atas tanah tersebut bagi melindungi kepentingannya ke atas tanah tersebut. Hanya selepas plaintif diberikan surat-surat pentadbiran kepada harta pusaka si mati barulah tindakan ini difailkannya pada 8 Disember 2011. Ini bermaksud selama sembilan tahun, iaitu dari tarikh PJB tersebut pada 10 Januari 2003 hingga 8 Disember 2011, si mati dan juga plaintif tidak menggunakan hak-hak mereka. Tiada penjelasan yang memuaskan telah diberikan oleh plaintif berhubung kenapa si mati tidak memulakan apa-apa tindakan terhadap defendan pertama semasa hayatnya. Dalam kes ini terdapat kelewatan melampau disebabkan tiada tindakan atau persetujuan si mati. Adalah tersirat bahawa jika si mati gagal untuk menggunakan pilihan untuk membeli tanah tersebut maka defendan pertama mempunyai hak untuk menjual tanah tersebut kepada defendan kedua. Setelah jualan tanah tersebut kepada defendan kedua, perjanjian-perjanjian yang telah ditandatangani antara defendan pertama dan si mati akan luput secara automatik (lihat perenggan 45, 47 & 51).

(5) Selanjutnya oleh kerana defendan kedua telah menjadi satu-satunya benefisiari tanah tersebut dan defendan pertama yang memegang tanah tersebut hanya sebagai pemegang amanah sementara menunggu pindah

hak tanah tersebut kepada defendan kedua, defendan pertama tidak lagi menerima sewa tanah daripada si mati dan plaintif selepas 5 April 2005 (lihat perenggan 51).

(6) Walaupun defendan-defendan telah menuntut ganti rugi tambahan atau teladan dalam tuntutan balas mereka, dalam pelaksanaan budi bicara mahkamah dan berdasarkan keadaan kes dan mengambil kira yang plaintif dan harta pusaka si mati akan kerugian jika plaintif gagal dalam tindakan ini, defendan-defendan tidak berhak terhadap ganti rugi sedemikian (lihat perenggan 55).]

Notes

For cases on sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5380–5384.

Cases referred to

Chon Then Tick v Metroplex Development Sdn Bhd [2009] MLJU 1597, HC (refd)

Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock [2005] 4 MLJ 493, CA (refd)

Lau Geok Foh v Tee Ah Kaw @ Tey Hock Soon [2011] 8 MLJU 149, HC (refd)

Nasri v Mesah [1971] 1 MLJ 32; [1970] 1 LNS 85, FC (refd)

Plimmer Bros v St Maur (1906) 26 NZLR 294 (refd)

Ponnusamy & Anor v Nathu Ram [1959] 1 MLJ 228; [1959] 1 LNS 73 (refd)

Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12 (refd)

Victor Glamour Sdn Bhd v Tan Kim Cheng [2010] MLJU 1740; [2011] 2 CLJ 508, CA (folld)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 9(1)
National Land Code Form 14A

Wong Rhen Yen (Raven Sivanesan and Hanif Idris with him) (Hanif Idris & Associates) for the plaintiff.
Lim Yew Hock (Yew Hock & Loh) for the defendants.

Yeoh Wee Siam J:

BRIEF FACTS

[1] The plaintiff is the administratrix of the estate of her late father, Tan Kim Cheng ('TKC') who died on 13 July 2011.

[2] The first defendant is the owner of the land held under No HS(D) 83603

Lot No 3719, Mukim Kuala Lumpur (previously formed part of the land held under Grant 5438 Lot 1810 ('the land')). A

[3] There are three agreements dated 27 June 1990 ('the first agreement'), 17 October 1990 ('the supplemental agreement') and 7 January 1992 ('the second agreement') entered into between TKC and the first defendant. B

[4] This claim involves the term of the second agreement dated 7 January 1992 where the first defendant had agreed to give TKC the first option to purchase the land at the prevailing market price which shall be determined by a licensed valuer jointly agreed to by parties. C

[5] On 30 September 2002 the first defendant, vide his solicitors, Messrs Yew Hock & Loh, gave notice through a letter to TKC to exercise the option to purchase the land subject to various terms and conditions. D

[6] After various correspondences between the solicitors for TKC and the first defendant, there was no sale and purchase agreement drafted or executed between the two parties. Finally, the first defendant entered into a sale and purchase agreement with the second defendant on 10 January 2003 ('the SPA'). E

[7] The plaintiff contended that the SPA between the first and second defendants is not valid and/or is null and void.

THE PLAINTIFF'S CLAIM F

[8] In the writ of summons and statement of claim, the plaintiff is applying for the following reliefs:

(a) a declaration that the first defendant has breached the agreements dated 27 January 1990, 17 October 1990 and 7 January 1992 respectively (collectively referred to as 'the agreements') entered into between TKC and the first defendant; G

(b) a declaration that the second defendant has not acquired any legal or beneficial interest in the land held under Title No HS(D) 83603 Lot No 3719, Mukim Kuala Lumpur ('the land') pursuant to the SPA; H

(c) a declaration that the plaintiff, including the plaintiff's tenants, assignees and successors in title, is entitled to uninterrupted possession of the buildings built and constructed by TKC on the land identified as: I

(i) 25-A, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(ii) 25A, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(iii) 25B, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(iv) 25C, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(v) 26A, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(vi) 26B, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(vii) 26C, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(viii) 26D, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(ix) 27, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(x) 30A, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(xi) 30B, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(xii) 30C, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(xiii) 30D, BT 4 1/2, Jalan Kelang Lama 58200 KL;

(xiv) 24A, BT 4 1/2, Jalan Kelang Lama 58200 KL;
(collectively referred to as 'the said units')
for so long as the plaintiff shall pay the ground rents to the first defendant;

(d) Specific performance of the agreements that:

(i) the plaintiff be entitled to exercise the option to purchase the land with a registrable transfer of the title in the land to the plaintiff within 14 days from the date of the judgment; and

(ii) a valuer to be appointed by the court to value the land as at 30 September 2002 which was the date of the notice by the first defendant to the plaintiff to exercise the option;

(e) an injunction restraining the defendants jointly or severally from evicting and/or obstructing the plaintiff from entering into the land or enjoying the benefit of the land and/or removing or demolishing the said units;

(f) damages for breach of the agreements in lieu of or in addition to specific performance to be assessed by this honourable court to be paid by the first defendant;

(g) damages for conspiracy to be assessed by this honourable court to be paid by the defendants jointly or severally;

(h) parties be given liberty to apply;

(i) interest at 8%pa from the date of the writ of summons on the decreed sum allowed by this honourable court until full settlement thereof;

(j) costs on a solicitor client basis;

(k) costs of this action; and

(l) further order and/or relief which this honourable court deems fit and fair in the circumstances of this case.

THE DEFENDANTS' COUNTERCLAIM

[9] In the counterclaim (as amended) the first and second defendants pray for the following judgment:

(i) a declaration that any contracts or agreements that were signed between the plaintiff and the first defendant have lapsed and are not valid anymore;

(iii) the plaintiff pays monthly ground rental for the units owned by TKC since 2005. A declaration that the plaintiff is occupying the portion of the said land on monthly tenancy basis;

(iv) the plaintiff is required to redeliver vacant possession portion of the said land that is occupied by the plaintiff without any payment of compensation if the plaintiff is given one month notice to do so by the defendants;

(v) a restraining order to prevent the plaintiff from filing legal proceeding to prevent the second defendant from registering as the new registered proprietor of the said land;

(vii) the plaintiff to pay exemplary and aggravated damages to the defendants;

(viii) the plaintiff to pay compensation to the first and second defendants;

(ix) such further reliefs/orders as this honourable court deems fit and just;

(x) costs to be paid by the plaintiff as administratrix or plaintiff personally.

(Note: There are no prayers (ii) and (vi) stated in the above counterclaim).

[10] Both parties have framed 12 issues to be tried some of which are overlapping. I shall now consider the main issues and, wherever appropriate, group some of the overlapping issues and consider them together.

WHETHER THE ACTION HEREIN TO RECOVER THE LAND IS TIME-BARRED BY SIX YEARS OR 12 YEARS PURSUANT TO THE LIMITATION ACT 1953

[11] The plaintiff filed this action on 8 December 2011.

[12] Under s 6(1)(a) of the Limitation Act 1953, the limitation period for any person to bring an action founded on a contract is 6 years from the date on which the cause of action accrued.

[13] Under s 9(1) of the same Act, the limitation period for any person to bring an action to recover any land is 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[14] This action is brought by the plaintiff based on the right of first option to purchase under the second agreement entered into between TKC and the first defendant on 7 January 1992. TKC could not exercise the option to purchase the land when the first defendant executed the SPA on 10 January 2003 to sell the land to the second defendant. I am of the view that this action is founded on contract and therefore limited by the limitation period of six years under s 6(1)(a) of the Limitation Act 1953.

[15] I have considered several cases which have decided that any action regarding entitlement to land should be treated as one for recovery of land and the limitation period should be 12 years (see *Chon Then Tick v Metroplex Development Sdn Bhd* [2009] MLJU 1597, Court of Appeal case *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 228; [1959] 1 LNS 73 and Federal Court case *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85).

[16] However, each case has to be decided according to its own facts. In the present case, it must be noted that due to the failure of TKC to exercise the option to purchase the land, there was therefore no sale and purchase agreement executed between TKC and the first defendant for such purchase. The plaintiff is relying on the second agreement which merely provides for the option to purchase. The plaintiff is in mere possession of the land as a tenant based on the three agreements but that does not give her or the estate of TKC a right or entitlement to recover the land. Clearly, the plaintiff's action is governed by s 6(1)(a) of the Limitation Act 1953 and not s 9(1) of the same Act. I therefore hold that the plaintiff's action is time-barred because the action was not filed within six years from 10 January 2003 when first defendant executed the SPA with the second defendant.

[17] Assuming that I have erred in holding that the limitation period applicable to this action is six years, based on contract and not 12 years for recovery of land, I am of the view that there is also undue delay by TKC or the plaintiff in filing this action. This issue of undue delay will be considered later on in this judgment.

WHETHER THE FIRST DEFENDANT BREACHED THE AGREEMENTS DATED 27 JUNE 1990, 17 OCTOBER 1990 AND 7 JANUARY 1992 ENTERED INTO BETWEEN THE FIRST DEFENDANT AND TKC

[18] The first agreement is dated 27 June 1990. The supplemental agreement is dated 17 October 1990. The second agreement is dated 7 January 1992.

[19] Under the first agreement the first defendant gave TKC the first option of being the developer for the construction works on the land. That option was exercised by TKC and he fulfilled his obligations by building and constructing 25 temporary buildings on the land. That option is a not an issue in this case.

[20] The second agreement provides, inter alia, that the first defendant shall not sell, transfer, lease or otherwise deal with the land without informing TKC. In the event that the first defendant is desirous of selling the land, he shall give TKC the first option of purchasing the land at the prevailing market price which shall be determined by a licensed valuer jointly agreed to by the parties (CBD Part A Vol 1 pp 50–53).

[21] The first defendant did give TKC the first option to purchase the land vide the letter of his solicitors dated 30 September 2002 subject to various terms and conditions which, inter alia, are:

(a) that the land will be sold on a 'as is where is' basis with all encumbrances attached to the land and the express and implied conditions stipulated in the document of title;

(b) that TKC has 14 days from the date of receipt of the said notice to exercise his option to purchase the land; and

(c) that in the event TKC did not reply and/or confirm to exercise his option to purchase the land on the terms stated therein within seven days from the date of receipt of the notice, the first defendant shall deem that TKC is not exercising his option to purchase the land and will be at the liberty to sell the land to any interested purchaser with all the encumbrances and the express and implied conditions stipulated in the document of title without reference to TKC (CBD Part A Vol 1 p 64).

[22] TKC, vide his solicitor's letter dated 10 October 2002 replied, inter alia, to inform the first defendant that he exercised his option to purchase the land at the prevailing market value. TKC raised the concern that if the land is sold with all encumbrances that will mean 'without transfer' which is the essential element of any sale.

[23] There were a series of correspondences between the solicitors for TKC and the first defendant. Basically, TKC wanted the guarantee of a legal and registrable transfer of the land and not one where the first defendant gives him a power of attorney and a trust deed which can only give TKC an equitable but not a registrable transfer. The first defendant required TKC to pay 20% of the purchase price upon execution of the sale and purchase agreement and 80% of the purchase price within three months from the date of the sale and purchase agreement. According to TKC's solicitors, this is a departure from normal conveyancing practice where the first payment is 10% followed by the balance payment of 90%.

[24] The second agreement is silent on what are the terms and conditions of the option that the first defendant should give to TKC to purchase the land. TKC's solicitors, by letter [and confirmed by the evidence of Mr Franklin Goonting ('PW3'), had the following reservations on the option given by the first defendant to TKC:

[25] The first defendant only wanted to dispose of the equitable interest in the land through three documents, namely, a trust deed, a power of attorney and a deed of assignment. TKC must be only a cash buyer because he would not be able to get a loan from a financial institution. The solicitors for TKC did not think that a deed of assignment is relevant or necessary since the subject matter did not involve a chose in action or a debt and therefore there was nothing to be assigned. The power of attorney and trust deed would not make it possible to transfer legal title of the land to TKC even upon full payment of the purchase price since the first defendant himself is also a trustee and beneficiary to 1/2 share of the land. The other 1/2 share of the land belongs to one M Sivapathy a/l Magasu ('Sivapathy') for whom the first defendant is also acting as trustee. the land is registered under the name of the first defendant.

[26] The plaintiff contended that the option falls far short of the option to purchase pursuant to the second agreement. It is not a proper option that could be exercised by TKC. Apart from that, there is the added issue of a portion of the land being acquired by the authorities and the first defendant would have to surrender his title, which was then not a final title, to the land office for re-issue of a new final title in respect of the unacquired part of the land. Before that could be done, the land office would have to survey the unacquired part of the land first.

[27] As far as the first defendant is concerned, the issues raised by TKC's solicitors could resolved or agreed, namely:

(a) the amount of deposit sum is to be paid by TKC when signing the sale and purchase agreement with the first defendant;

(b) the new document of title can be issued upon survey to exclude the acquired portion of the land; and

(c) the trustee could get a court order to sell the land to TKC and this could be included as a provision in the sale and purchase agreement between TKC and the first defendant to ensure that TKC can be registered as the new proprietor of the land.

[28] Low Sow Khum ('DW1'), the defendant's sole witness, who was then the first defendant's solicitor for conveyancing, stated that in her opinion the only person who can purchase the land at the material time is TKC. This is due to the fact that all the private caveats (except one private caveat entered into by one Muthu a/l Murugiah which the first defendant undertook to remove) were encumbered by TKC himself and it is within the control of TKC to remove the private caveats. In other words, TKC can register himself as the new registered proprietor of the land once the full purchase price is paid (after Muthu's caveat is removed).

[29] Going by the evidence, it is clear that TKC could not accept the option to purchase due to the terms and conditions imposed by the first defendant. TKC wanted to negotiate further but the first defendant was reluctant to do so.

[30] By a letter dated 3 December 2002 to TKC's solicitors, the first defendant, through his solicitors, notified that he would sell the equitable interest in the land to any interested purchaser as he deemed fit effective from that date without further reference to TKC (CBD Part A Vol 1 pp 81–82).

[31] About five weeks later, on or about 10 January 2003, the first defendant entered into the SPA to dispose of the equitable interest in the land to the second defendant (CBD Part B pp 1–40).

[32] Going by the evidence adduced, it is my finding that the first defendant did give TKC the first option to purchase the land. Since TKC did not agree to the terms and conditions and time frame set by the first defendant, that option had lapsed and the first defendant was at liberty to sell it to the second defendant.

WHETHER THE PLAINTIFF IS ENTITLED TO EXERCISE THE OPTION TO PURCHASE THE LAND AT THE VALUE AS ON 30 SEPTEMBER 2002

[33] In view of what the court has found and held above that TKC was given the first option to purchase, which option was not exercised according to the first defendant's terms and conditions, the option has now lapsed. Accordingly,

the plaintiff is not entitled to exercise the option to purchase the land at the value as on 30 September 2002.

Whether the agreement dated 10 January 2003 entered into by the first and second defendants is valid in law, or is it null and void.

Whether the second defendant has acquired any legal interest and/or beneficial interest in the land based on the sale and purchase agreement dated 10 January 2003 signed by the defendants.

Whether the full purchase price was paid by the second defendant to the first defendant in respect of the sale of the land.

Whether there is conspiracy between the first and the second defendants to harm TKC by way of unlawful action.

[34] DW1 confirmed that as the terms of the sale and purchase agreement cannot be agreed upon by TKC and the first defendant, the option to purchase given to TKC has lapsed. The first defendant then decided to sell the beneficial interest of the land to the second defendant. The first defendant did not appoint solicitors to act for him and DW1 was appointed by the second defendant to prepare the legal documentation for the sale transaction. For that purpose, DW1 prepared the following documents:

(a) sale and purchase agreement dated 10 January 2003 between the first defendant (as trustee vendor) and the second defendant (purchaser) and the first defendant and Sivapathy (as beneficiaries of the land) (CBD Part A pp 1–10 and CBD Part A Vol 3 p 596) ('the SPA').
The SPA was duly signed by all the parties and the signatures of the vendor and beneficiaries were duly attested by DW1;

(b) Form 14A of the land was duly signed by the first defendant and duly attested by DW1 (CBD Part A p 94 and CBD Part A Vol 3 p 739);

(c) a declaration of trust by the first defendant as trustee dated 13 April 2005 (CBD Part B pp 48–52 and also at CBD Part A vol 3 pp 747–758) and the first defendant's signature was duly attested by DW1.
The trust beneficiaries ie the first defendant and Sivapathy, vide a letter dated 5 April 2005 consented to the sale and after receiving the full purchase price had instructed the registered proprietor of the land, ie the first defendant, to execute a declaration of trust; and

(d) a declaration of trust by the first defendant and Sivapathy as beneficiaries dated 13 April 2005 (CBD Part B p 53) and the first defendant's signature was duly attested by DW1.

[35] DW1 stated that Form 14A was not dated because they were unable to

present the said form for registration at the land office because of the private caveats and injunction on the land (or until all the said land is free from encumbrances).

[36] DW1 further stated that the trust deeds in paras (c)–(d) above were dated 13 April 2005 because the full purchase price was paid on 5 April 2005 to the first defendant (letter of Messrs Yew Hock & Loh dated 5 April 2005 in CBD Part B p 41, and also CBD Part B Vol 1 p 738). The trust deed can only be dated after 5 April 2005 as provided in the SPA.

[37] It is clear from the evidence of DW1 that effective from 5 April 2005 (after the full purchase price of the land was paid) the second defendant is the sole beneficiary of the land and the first defendant is holding the land as a bare trustee.

[38] According to DW1, the original document of title to the land was forwarded to the second defendant for safe keeping after the first defendant received the full purchase price on 5 February 2005.

[39] In addition to the above evidence, I noted the decision of the Court of Appeal in Civil Appeal No WO-02–161 of 2009 between the late TKC and the second defendant, *Victor Glamour Sdn Bhd v Tan Kim Cheng* [2010] MLJU 1740; [2011] 2 CLJ 508 or CBD Part A Vol 1 pp 83 and 90–92) which, inter alia, stated:

> (7) The appellant in their supporting affidavit affirmed by their Director Ho Swee Ming on 25 May 2007 averred that the full purchase price had been paid on 5 April 2005 whereupon the original grant and the duly executed Memorandum of Transfer in Form 14A of the said Land was handed by the registered proprietor to his solicitors Messrs Yew Hock and Loh. In support of the averment aforesaid the letter dated 5 April 2005 and the duly executed Memorandum of Transfer was tendered as exh. 'HMS2'.
>
> (8) In further support of their interest over the said Land the appellant averred that on 13 April 2005 on instruction from the beneficiaries the registered proprietor executed a Deed of Trust in favour of the appellant which Deed of Trust was exhibited as 'HMS3'.; and
>
> (18) Upon a scrutiny of the evidence presented we are of the view that the learned judge failed to exercise this discretion judiciously as there is more than ample evidence to conclude that the appellant herein falls within the category of 'aggrieved person' as envisaged by s.327 NLC and had sufficient interest to set aside the caveats filed by the respondent.; and
>
> (20) … the appellant's status is that of a purchaser as evident by the Sale & Purchase Agreement dated 10 January 2003 entered into between the appellant as purchaser and Magasu Sundram a/l T. Magasu as registered

proprietor as vendor. The Sale and Purchase Agreement which appears at pp. 549 to 588 of the appeal record is entered into with the consent of the trust beneficiaries.

(21) The evidence further shows that the trust beneficiaries Magasu Sundram a/l T. Magasu and M. Sivapathy a/l Magasu consented to the sale when they instructed the registered proprietor Magasu Sundram vide letter dated 5 April 2005 to execute a Declaration of Trust in favour of the appellant which was duly complied with by the registered proprietor vide Declaration of Trust dated 13 April 2005 - see pp. 603 and 599 to 603 of the appeal record respectively.

(22) As regards the payment of the full purchase price we are satisfied that there is ample evidence that it had been paid as evident by the acknowledgment and confirmation of receipt of the full purchase price in the letter of 5 April 2005 by the Solicitors Messrs Yew Hock Loh (see pp. 590 of appeal record). It must be stressed that the particulars of the cheques and the amount thereof were expressly stated in the letter aforesaid.

(23) The divestment of the proprietary rights over the said land by the registered owner is concretised by the duly executed Memorandum of Transfer and the original issue of document of title being handed over and surrendered to the appellant - see pp 591 - 593 and 594 - 597 respectively.; and

(28) … The respondent's reliefs (if any) is contractual in nature against the registered owner and does not bind the appellant who is not a party to the several agreements entered into by the respondent with the registered owner.

[40] The Court of Appeal has accepted the SPA dated 10 January 2003 as a valid agreement between the first and second defendants and held that the second defendant was an aggrieved person.

[41] I am mindful of the fact that the Court of Appeal case was based on a different cause of action between the second defendant and TKC for the removal of the eight private caveats entered by TKC to protect his interests in the land. However, it is incumbent upon this court to consider the findings of the Court of Appeal which were decided based on affidavit evidence as contained in the appeal record. Upon a perusal of the grounds of judgment of the Court of Appeal, I am satisfied that my findings are consistent with, and in fact have been fortified by the findings and decision of the Court of Appeal.

[42] There is no evidence adduced by the plaintiff of any conspiracy between the first and second defendants regarding the SPA in order to deprive TKC or his estate from exercising TKC's option to purchase the land. I find that the second defendant is a bona fide purchaser.

[43] Based on the above relevant documents executed, as confirmed by DW1 and stated by the Court of Appeal, I hold that the SPA dated 10 January 2003 between the first and second defendants is valid in law, and it is not null and void. There is no doubt that the full purchase price has been paid by the second defendant and the original title forwarded to them by DW1.

[44] With the removal of the eight caveats entered by TKC, the only impediment now is the interim injunction granted by the court dated 10 February 2012 restraining the defendants from transferring or dealing with the land pending the disposal of this action. That injunction is now lifted or revoked.

WHETHER THERE IS UNDUE DELAY IN THE PLAINTIFF'S ACTION

[45] The evidence shows that TKC did nothing during his lifetime to file an action for specific performance for the second agreement regarding his right of first option to purchase the land. TKC merely entered 8 caveats on the land to protect his interest in the land. It is only after the plaintiff was granted the letters of administration to the estate of TKC that the plaintiff filed this action on 8 December 2011. From the date of the SPA on 10 January 2003–8 December 2011 it is about eight years and 11 months. Therefore, for nearly nine years TKC, and in turn the plaintiff, sat on their rights. The plaintiff, through PW1, did explain that TKC died interstate on 13 July 2011 and letters of administration was only granted to her on 7 October 2011. However, this does not detract from the fact that TKC in his lifetime from the period 10 January 2003 until his demise on 13 July 2011 did not institute any action against the first defendant to compel the first defendant to sell the land to him. There is no satisfactory explanation given by the plaintiff on this.

[46] In *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 the case of *Plimmer Bros v St Maur* (1906) 26 NZLR 294 was followed which stated that 'it was his duty to commence an action promptly if he considered himself entitled to specific performance, here nothing was done in sixteen months in an action for specific performance under such circumstances will be hopeless in my opinion, to prevent a man from dealing with his property after such a long delay is so inequitable that the court will lend it assistance to such a proceeding …'

[47] In the present case, there is undue delay due to TKC's inaction or acquiescence. The second defendant has already paid the full purchase price of RM4,886,342 to the first defendant and obtained the order from the Court of Appeal to remove the eight private caveats lodged by TKC on 29 November

2010. TKC also failed to obtain leave to appeal to the Federal Court. On 11 April 2011 TKC instructed his solicitors to withdraw all the private caveats lodged by him.

[48] As submitted by counsel for the defendants, if TKC had commenced proceedings promptly without undue delay to enforce what is perceived to be his rights under the contract in question and the completion of the SPA dated 10 January 2003 can be delayed pending the outcome of any litigation commenced by TKC, the second defendant would not have to pay the balance purchase price to the first defendant and also need not incur expenses to proceed to remove the caveats lodged by TKC. This shows that TKC was not interested to buy the land but his main purpose for lodging the caveats is to prevent the first defendant from dealing with the property. It appears to me that TKC was only interested in collecting rental from the temporary buildings that he constructed on the land. To allow a claim for specific performance after such a long delay (nine years) without any valid explanation would cause great injustice to the defendants by preventing them from continuing to deal with the land.

[49] In *Lau Geok Foh v Tee Ah Kaw @ Tey Hock Soon* [2011] 8 MLJU 149 the court dismissed an application for specific performance due to a delay of six years in commencing the proceeding.

[50] In *Koperasi Wanita Sarawak Bhd & Anor v Robert Sim Teck Hock* [2005] 4 MLJ 493 the Court of Appeal held that a delay of seven years in commencing proceedings by the respondents is inordinate and inexorable and is fatal to the respondent's case.

> *Whether all or part of the terms of the contract or agreements signed between the plaintiff and the first defendant has expired and is invalid due to the failure of TKC to pay monthly ground rental to the second defendant since 2005.*
>
> *If the answer to the above is affirmative, whether the plaintiff has only occupied the sites on the land on a monthly tenancy basis.*

[51] It is implicit that should TKC fail to exercise the option to purchase the land under the second agreement then the first defendant has the right to sell the land to the second defendant. Upon the sale of the land to the second defendant, the agreements signed between TKC and the first defendant would lapse automatically. The first defendant would no longer be able to collect the ground rental for the land from the plaintiff effective from 5 April 2005 after the full purchase price was paid by the second defendant to the first defendant. The second defendant has become the sole beneficiary of the land and the first defendant was holding the land as a mere trustee pending the registration of the

transfer of the land to the second defendant. Therefore, as DW1 had stated, the first defendant could no longer accept the ground rental from TKC and the plaintiff after 5 April 2005.

[52] It is pertinent to note that TKC and/or the plaintiff made no attempt to institute proceedings to compel the first defendant and/or the second defendant to accept the ground rental. Neither was any action taken to pay the ground rental into court or to any solicitors in a stakeholding pending the outcome of this case or any litigation between both parties.

[53] The court holds that the agreements signed between TKC and the first defendant have lapsed or expired. The plaintiff is now only occupying the sites on the land on a monthly tenancy basis.

IF THE PLAINTIFF FAILS IN THIS ACTION, WHETHER THE PLAINTIFF SHOULD BE PRECLUDED FROM FILING ANY ACTION IN COURT TO RESTRAIN THE SECOND DEFENDANT FROM REGISTERING THEIR NAME AS THE REGISTERED OWNER OF THE LAND

[54] In view of the findings of this court, and following the Court of Appeal decision in *Victor Glamour Sdn Bhd v Tan Kim Cheng*, if the plaintiff fails in this action, the plaintiff is precluded from filing any action to restrain the second defendant from registering their name as the registered owner of the land.

IF THE PLAINTIFF FAILS IN THIS ACTION, WHETHER THE PLAINTIFF SHOULD PAY AGGRAVATED AND EXEMPLARY DAMAGES TO THE DEFENDANTS TO HAVE INITIATED THIS PROCEEDING EVEN HAVING REALISED THAT THEY ARE UNLIKELY TO SUCCEED IN PREVENTING THE SECOND DEFENDANT FROM REGISTERING THEMSELVES AS THE NEW REGISTERED OWNER

[55] In the exercise of the court's discretion, and going by the circumstances of the case, and considering that the plaintiff and the estate of TKC have a lot to lose should the plaintiff fail in this action, I do not think that aggravated or exemplary damages should be awarded to the defendants.

DECISION

[56] Based on the above considerations, the court orders as follows:

(a) The plaintiff's claim.

The plaintiff's claim is dismissed.

(b) The defendants' counterclaim.
Prayers (i), (iii), (iv) and (v) are allowed.
Prayers (vii) and (viii) are not allowed.

[57] For both the plaintiff's claim and the defendants' counterclaim considered together, costs of RM20,000 are to be paid by the plaintiff as administratrix of TKC's estate to the defendants jointly.

Plaintiff's claim dismissed and defendants' counterclaim allowed in part with costs of RM20,000.

Reported by Kohila Nesan